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In the Supreme Court of the United States

OCTOBER TERM, 1988

COMMONWEALTH OF MASSACHUSETTS, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Montgomery Amendment, 10 U.S.C. 672(f) (Supp. V 1987)—which prohibits a State's governor from withholding consent to a unit of the National Guard's being ordered to active duty outside the United States on the ground that the governor objects to the location, purpose, type, or schedule of that duty—is a constitutional exercise of Congress's power under the Armies Clause, U.S. Const. Art. I, § 8, Cl. 12.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 859 F.2d 1066. The opinion of the district court (Pet. App. 6a-43a) is reported at 686 F. Supp. 30.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1988. The petition for a writ of certiorari was filed on January 21, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1933, Congress established the "dual-enlistment system" for the National Guard. Under this system, each

National Guardsman enlists simultaneously in two distinct organizations: (i) the Army or Air National Guard of a particular State, each a part of the organized militia of that State (see 32 U.S.C. 101(3)-(4), 101(6), 304) and (ii) the Army or Air National Guard of the United States, each a reserve component of the national armed forces (see 10 U.S.C. 101(11), 101(13), 261, 3261, 8261 (1982 & Supp. V 1987); 32 U.S.C. 101(5), 101(7)).[1] The National Guard of the United States (NGUS) is a wholly federal organization; when serving on active duty, NGUS personnel are relieved from duty in their respective state National Guards. 32 U.S.C. 325.

Congress has prescribed the conditions under which members of the NGUS may be ordered to active duty and the length of the periods during which service may be required for particular purposes. *E.g.*, 10 U.S.C. 672-675 (1982 & Supp. V 1987). For instance, in time of war or of national emergency declared by Congress, or when otherwise authorized by law, federal authorities may order any NGUS unit into active duty (other than for training) for the duration of the war or emergency and for six months thereafter. 10 U.S.C. 672(a). Under Section 672(b), a unit of the NGUS may be ordered to active duty for any purpose, with the consent of the governor of the State from which that unit comes, for up to 15 days a year.[2] And,

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[1] The history that led up to the adoption of this system is summarized in Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181 (1940).

[2] This section provides:

> (b) At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than

under Section 672(d), any member of the NGUS may be ordered to active duty indefinitely, with his consent and the consent of the governor of the State of whose National Guard he is also a member.[3]

In 1986, after several governors expressed opposition to the Administration's Central American policy and indicated that they would withhold their consent to National Guard training missions in that region, Congress enacted the Montgomery Amendment, 10 U.S.C. 672(f) (Supp. V 1987). This provision prohibits a governor from withholding consent to an NGUS unit's active duty outside the United States because of any objection to the location, purpose, type or schedule of that duty:

> (f) The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.

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15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor of the State or Territory, Puerto Rico, or the Canal Zone, or the commanding general of the District of Columbia National Guard, as the case may be.

[3] This section provides:

> (d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned.

2. In September 1987, a unit of the NGUS in Massachusetts was designated to participate in a training mission in Central America from May 28, 1988, through June 11, 1988 (Pet. App. 8a). Petitioner Dukakis, the governor of Massachusetts, objected to that mission on grounds covered by the Montgomery Amendment (*id.* at 8a, 11a-12a). The National Guard Bureau responded that the unit was being ordered to active duty in its "federal status as members of the Army National Guard of the United States" and that the Montgomery Amendment prohibited the withholding of consent on the grounds petitioner Dukakis had expressed (*id.* at 10a-11a).

Petitioners then filed suit in the United States District Court for the District of Massachusetts, alleging that the Montgomery Amendment is unconstitutional under the Militia Clause, U.S. Const. Art. I, § 8, Cl. 16. The complaint sought declaratory relief to this effect and an injunction prohibiting respondents from ordering elements of the Massachusetts National Guard to active duty without the consent of the State's governor.

The case was tried by stipulation to the district court. In addition to recounting the events described above, the stipulation provided that, but for the Montgomery Amendment, petitioner Dukakis would withhold his consent (i) to the use of the NGUS unit from Massachusetts in the 1988 training mission and (ii) to future orders requiring other units of the NGUS in Massachusetts to participate in training in Central America if he objected to the location, purpose, type or schedule of the training (Pet. App. 11a-12a). However, the stipulation also stated that petitioner Dukakis would comply with the statute until it was declared unconstitutional or otherwise stayed (*ibid.*).

3. In a decision issued on May 6, 1988, the district court held that the Montgomery Amendment "is a valid

exercise of Congress' power under the Armies Clause and does not violate the Militia Clause" (Pet. App. 42a).[4]

The district court described the question presented by this case as whether Congress has "power under the Armies Clause to order members of the National Guard into active duty * * * for purposes arguably inconsistent with the Militia Clause—specifically, to train outside the United States without state consent" (Pet. App. 23a). It noted at the outset that the rationale of petitioners' position—that the Militia Clause limits Congress's power under the Armies Clause—would reach the entire dual-enlistment system, not just active duty for purposes of training (*id.* at 24a-25a). From this perspective, the court rejected petitioners' understanding of the relation between the Armies Clause and the Militia Clause. Citing decisions of lower federal courts that had upheld the dual-enlistment system,[5] the court concluded that "the states' au-

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[4] Under the Armies Clause, U.S. Const. Art. I, § 8, Cl. 12, Congress has the power:

> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years[.]

The Militia Clause confers power on Congress (U.S. Const. Art. I, § 8, Cls. 15-16):

> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [and]
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.]

[5] *Johnson* v. *Powell*, 414 F.2d 1060 (5th Cir. 1969) (use of National Guard units abroad in Vietnam War was authorized by the Armies Clause, even though it fell into none of the categories permitted by the Militia Clause); *Drifka* v. *Brainard*, 294 F. Supp. 425 (W.D. Wash. 1968).

thority over training of the militia, reserved in the Militia Clause, does not apply to the period during which members of the militia are on active duty as part of the NGUS" (*id.* at 29a-30a).

The district court found further support for that conclusion in the *Selective Draft Law Cases,* 245 U.S. 366 (1918), in which this Court upheld Congress's authority to draft members of the militia into the national armed forces. In those cases, this Court stated that the Militia Clause preserves state control over the militia only "to the extent that such control was not taken away by the exercise by Congress of its power to raise armies" (245 U.S. at 382-383). The district court acknowledged that this case presented "the issue of the accommodation between the Armies Clause and the Militia Clause in a context less compelling than that of the *Selective Draft Law Cases,*" but concluded nevertheless that the reservation to the States of " 'the Authority of training the Militia according to the discipline prescribed by Congress,' expressed in the Militia Clause, does not override the legitimately exercised power of Congress '[t]o raise and support Armies.' " Pet. App. 37a-38a.

The district court also concluded that petitioners' challenge to the dual-enlistment system would be without merit even if it could be limited to "Congress' power to control the peacetime training of the National Guard" (Pet. App. 38a). The court explained that an interpretation of the Armies and Militia Clauses that precluded ordering members of the NGUS to active duty for purposes of training would be "a rather extraordinary accommodation between the two separate clauses of the Constitution." Pet. App. 39a. Under that view, the court explained, Congress would have the authority to order the NGUS to active duty for purposes other than training, but training would have to be suspended during the period of

active service or conducted only under the auspices of the States. The court found that this interpretation attributed a meaning to the Constitution unlikely to have been intended by the Framers. *Id.* at 40a.

Finally, the district court noted, its interpretation of the Militia Clause would preserve that provision's meaning and purpose "both (a) as it limits congressional power over the militia when it is not on active duty as a part of the army and (b) as it enables Congress to exercise more sparingly its broad army power" (Pet. App. 42a).

4. In a *per curiam* decision issued on October 25, 1988, the court of appeals affirmed on the basis of the district court's opinion (Pet. App. 1a-5a).

ARGUMENT

The decision of the courts below is correct and is consistent with the *Selective Draft Law Cases* and with lower court decisions that have upheld the constitutionality of the dual-enlistment system. Although a divided panel of the Eighth Circuit recently issued an opinion holding that the Montgomery Amendment is unconstitutional, *Perpich* v. *Department of Defense,* No. 87-5345 (Dec. 6, 1988), the Eighth Circuit subsequently vacated that decision and granted rehearing *en banc.* Under these circumstances, there is at present no conflict in the circuits with respect to the question presented by this case, and further review of the lower courts' decision is therefore not warranted.

1. The power of Congress to "provide for the common Defence" and "raise and support Armies" obviously includes the authority to provide for the training of the national armed forces. See *Chappell* v. *Wallace,* 462 U.S. 296, 300 (1983); *Goldman* v. *Weinberger,* 475 U.S. 503, 508 (1986).[6] In Section 672, as modified by the Mont-

[6] That authority is also obviously not limited to times of declared war or national emergency. See *United States* v. *O'Brien,* 391 U.S.

gomery Amendment, Congress has expressly authorized Executive Branch officials to order the NGUS—reserve components of the national armed forces—into active duty for up to 15 days a year for any purpose, including training. This statute is clearly within Congress's constitutional authority to provide for the Nation's defense and raise and support its armed forces.

The lower courts correctly held that the Militia Clause does not withdraw Congress's authority, under the Armies Clause, to order members of the NGUS to active duty for purposes of training. In the *Selective Draft Law Cases, supra,* this Court rejected the basic premise of petitioners' position—the proposition that restrictions placed by the Militia Clause on federal authority over the militia also limit Congress's authority under the Armies Clause to require members of the militia to serve in the national armed forces. The Court explained, in terms that are fully applicable to this case, that the authority over the militia reserved to the States "did not diminish the military power [conferred on Congress by, *inter alia,* the Armies Clause] or curb the full potentiality of the right to exert it * * * " (245 U.S. at 383). Moreover, the Court continued, the fact that the Militia Clause permits the use of the militia only for specified purposes does not suggest that Congress's power under the Armies Clause "was not complete to the extent of its exertion and dominant." *Ibid.* Similarly, in *Cox* v. *Wood,* 247 U.S. 3, 6 (1918), the Court reaffirmed that Congress's powers to raise and support armies and to declare war "were not qualified or restricted by the provisions of the militia clause." See also *Tarble's Case,* 80

367, 377-378 (1968). See also *Selective Service System* v. *Minnesota Public Interest Research Group,* 468 U.S. 841, 861 n.3 (Powell, J., concurring).

U.S. (13 Wall.) 397, 408 (1871).[7]

2. Congress relied on the *Selective Draft Law Cases* when, precisely in order to assure that members of the National Guard would be available for service in the national armed forces without regard to the limitations of the Militia Clause, it enacted the dual-enlistment system. See H.R. Rep. No. 141, 73d Cong., 1st Sess. 1-6 (1933). Consistent with this Court's decision, the lower federal courts have sustained this system against the claim that it encroaches on power reserved to the States.

For instance, in *Johnson* v. *Powell,* 414 F.2d 1060 (1969), the Fifth Circuit rejected an argument that units of the National Guard could not be ordered to active duty in the NGUS to fight abroad in Vietnam. Though it recognized that the Vietnam War involved none of the situations in which Congress may call forth the militia as such, *i.e.,* executing the laws of the Union, suppressing insurrections, and repelling invasions, the court concluded that "the dual enlistment system was a proper exercise of power necessary and proper to the raising and supporting of armies" (*id.* at 1064) and that Congress's power under these provisions "is not limited to the conditions of service

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[7] *Maryland* v. *United States,* 381 U.S. 41, 46-47, vacated and modified on other grounds, 382 U.S. 159 (1965), and *United States* v. *Miller,* 307 U.S. 174 (1939), upon which petitioners rely (Pet. 21), do not suggest otherwise. In *Maryland,* the only issue was whether, at a time when a National Guard unit had not been called into federal service, a Guard officer who also served as a caretaker of the unit's federally provided equipment was an "employee" of the federal government for purposes of the Federal Tort Claims Act. The Court held that he was not. The Court's reference to the National Guard as the "modern Militia reserved to the States" by the Militia Clause (381 U.S. at 46) did not suggest that members of the Guard could not be ordered to active duty in the national reserve. *Miller,* which held that a statute requiring registration of weapons was not invalid under the Second Amendment, has no relevance to this case.

set forth in the militia clause" (*id.* at 1063). Accord *Drifka* v. *Brainard,* 294 F. Supp. 425 (W.D. Wash. 1968).[8]

3. Petitioners' principal contention is that the Militia Clause reserves to the States all responsibility for the peacetime training of the militia, and thus that the federal government has no authority to order members of the militia to active duty in the national armed forces for that purpose. Pet. 12-20. In petitioners' view, this Court's holding in the *Selective Draft Law Cases* was "strictly limited to, and * * * fundamentally predicated upon, the existence of a national exigency" (Pet. 23; see *id.* at 19-20). This line of argument cannot withstand analysis.

As the lower courts noted (Pet. App. 24a-25a), the language of the Constitution provides no basis for distinguishing—for purposes of their effect on Congress's power under the Armies Clause—between the States' power to train the militia and other limitations on federal authority set forth in the Militia Clause. For instance, under the Militia Clause, the militia as such may be called

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[8] Contrary to petitioners' suggestion (Pet. 25 n.4), *United States* v. *Peel,* 4 M.J. 28, 29 (C.M.A. 1977), *United States* v. *Hudson,* 5 M.J. 413 (C.M.A. 1978), and *United States* v. *Self,* 8 M.J. 519, 521 (A.C.M.R. 1979), aff'd, 13 M.J. 132 (C.M.A. 1982), do not support further review of this case (Pet. 25 n.4). In those cases, the issue was whether accused National Guardsmen had been on active duty in the NGUS at the time when court-martial authorities asserted personal jurisdiction over them. Brief statements in the opinions in those cases suggesting that the States' consent to the Guardsmen's federal service was constitutionally necessary were dicta, since the cases turned on applicable statutes and regulations. Moreover, those dicta predated the passage of the Montgomery Amendment and were unaccompanied by even cursory analysis of the constitutional relationship between the Armies Clause and the Militia Clause. For instance, none of these cases even cite or discuss the *Selective Draft Law Cases.* Any conflict between those dicta and the decision of the lower courts does not warrant this Court's review.

into federal service only to execute the laws, suppress insurrections, and repel invasions. If, as petitioners argue, the Militia Clause prohibits Congress from requiring members of the organized militia to engage in peacetime training in the national armed forces, there is no textual or other basis for finding that Congress has authority to require the same individuals to participate as members of the national armed forces in missions, such as the participation in a war abroad, that are not encompassed by the Militia Clause. Accordingly, the Court's decision in the *Selective Draft Law Cases*—which held that the Militia Clause does not limit Congress's authority to raise and support armies to fight abroad—cannot fairly be distinguished from this case.

Similarly, the Court's holding in the *Selective Draft Law Cases* cannot, as petitioners contend (Pet. 23), be restricted to situations involving "a national exigency." Neither the text of the Constitution nor the language of that decision recognizes a limitation of that nature on Congress's power to raise and support armies. Indeed, it is hard to imagine how such a limitation could be applied or enforced, since there are no apparent standards that would enable any of the Branches to determine when a situation was sufficiently urgent to permit the exercise of Congress's power under the Armies Clause.

Finally, as the lower courts noted, even if there were a basis for limiting petitioners' attack on the dual-enlistment system to peacetime training, petitioner's view would still represent "a rather extraordinary accommodation between the two separate clauses of the Constitution." Pet. App. 39a. Under that view, Congress would have the power to order members of the state militias to active duty in the national armed forces to perform missions other than those permitted by the Militia Clause, but would not have the power to direct their training to perform those missions. Indeed, as the lower courts stressed, petitioners'

position on its face would not even allow federal authorities to direct the training of National Guard units at a time when they had been ordered to active duty in the NGUS for a different purpose. The lower courts properly refused to accept a view which attributes to the Constitution "a meaning so unlikely to have been intended by * * * the framers" (*id.* at 40a).[9]

The flaws inherent in petitioners' position are particularly apparent in the context of our Nation's present defense posture. The NGUS is now an integral part of the front-line defenses of the United States. As of 1986, the Army NGUS provided 46 percent of the Army's combat units and 28 percent of its support forces (C.A. App. 29). In the event of full mobilization, 18 of the Nation's 28 Army divisions would be provided wholly or in part by the Army NGUS. For fiscal year 1987, the Air NGUS provided 73 percent of our Nation's air defense interceptor forces, 52 percent of our tactical air reconnaissance, 34

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[9] This case does not present the question whether Congress could effectively abolish the state militias by inducting all of their members into the national armed forces. Without suggesting that any of these factors are essential to the constitutionality of the Montgomery Amendment, we note that state militias are not limited to the National Guard, but also include "unorganized militias," now all able-bodied men between the ages of 17 and 45 (10 U.S.C. 311); that a State is not required to establish a National Guard (although federal funding provides a powerful incentive to do so (see 32 U.S.C. 106-108)); that a State may establish a separate "defense force" outside the National Guard (32 U.S.C. 109); and that, even under the Montgomery Amendment, governors have authority to withhold consent to the use of National Guard units abroad under Sections 672(b) and 672(d) on grounds other than those foreclosed by that statute (see 132 Cong. Rec. H6237 (daily ed. Aug. 14, 1986) (remarks of Rep. Montgomery)). As the lower courts recognized, the Montgomery Amendment is thus a far cry from an attempt to render the Militia Clause meaningless. Pet. App. 41a-42a.

percent of our tactical airlift, 25 percent of our tactical fighters, 17 percent of aerial refueling, and 24 percent of our tactical air support forces (*ibid.*). It would be incongruous to hold that the Constitution gives Congress the power to establish these reserves as components of the national armed forces, but at the same time withholds authority from federal authorities to conduct their training. Such a view would not only undercut the effectiveness of the national defense, but would also inject the States into matters of foreign policy that the Constitution reserves to the federal government.

4. As the petition reflects (Pet. 25-30), the decision of the lower courts conflicts with a recent decision issued by a divided panel of the Eighth Circuit in *Perpich, supra.* However, the Eighth Circuit has vacated that decision and granted rehearing *en banc.* There is, accordingly, no conflict among the circuits at present with respect to the constitutionality of the Montgomery Amendment and, in our view, no reason for this Court to hear this case. If the Eighth Circuit were to hold in *Perpich* that the Montgomery Amendment is unconstitutional, the Court would then have the opportunity to consider that question upon a petition seeking review of that decision.[10]

[10] The case was argued to the full court on February 16, 1989. As of the filing of this brief, the Eighth Circuit has not yet issued a decision.

CONCLUSION

The petition for writ of certiorari should be denied.
Respectfully submitted.

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